Petition

81-778

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SOUTHERN RAILWAY COMPANY and
THE CINCINNATI, NEW ORLEANS AND
TEXAS PACIFIC RAILWAY COMPANY,
Petitioners,

v.

MZELL WILLIAMS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the district courts have authority to adopt local rules providing for the review, in certified class actions, of proposed communications from class representatives to absent class members.

LIST OF PARTIES

The petitioners are two corporations: Southern Railway Company and its wholly owned subsidiary The Cincinnati, New Orleans and Texas Pacific Railway Company. Petitioners operate under the trade name "Southern Railway System." Other than wholly-owned subsidiaries, the subsidiaries and affiliates of petitioners are:

Algers, Winslow and Western Railway Company
Atlantic and North Carolina Railroad Company
Augusta and Summerville Railroad Company
Beaver Street Tower Company
Central Transfer Railway and Storage Company
Chatham Terminal Company
Chattanooga Choo-Choo Company
The Cincinnati Union Terminal Company
1575 Eye Street Associates
Fruit Growers Express Company
High Point, Randleman, Asheboro and Southern Railroad Company
Kentucky & Indiana Terminal Railroad Company
Mobile and Birmingham Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
Norfolk and Western Railroad Company of Virginia (indirectly owned)
The North Carolina Midland Railroad Company
The North Carolina Railroad Company
North Charleston Terminal Company
NWS Enterprises, Inc.
Pine Brook Center, Limited
Pullman Company
Queen City Developers
Richmond-Washington Company
Richmond, Fredericksburg and Potomac Railroad Company (indirectly owned)

700 North Fairfax Street Limited Partnership
Southern Railroad Company of Virginia (indirectly owned)
State University Railroad Company
Terminal Railroad Association of St. Louis
The South Western Rail Road Company
Trailer Train Company
Woodstock & Blocton Railway Company
Yadkin Railroad Company

The other parties to the proceedings before the United States Court of Appeals for the Sixth Circuit were: Mzell Williams; the United Transportation Union and United Transportation Union Local 1190; the Equal Employment Opportunity Commission; and the United States District Court for the Southern District of Ohio, Western Division at Cincinnati (Timothy S. Hogan, Senior United States District Judge).

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Petitioners,

v.

MZELL WILLIAMS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Southern Railway Company and The Cincinnati, New Orleans and Texas Pacific Railway Company respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit, entered on August 26, 1981.

OPINIONS BELOW

The August 26, 1981 opinion of the court of appeals, not yet reported, appears in the Appendix at 1a. The October 5, 1981 order of the court of appeals amending the August 26,1981 slip opinion is unreported and appears in the Appendix at 13a. The July 2, 1979 order of the district court requiring compliance with S.D. Ohio Rule 3.9.4 is unreported and appears in the Appendix (without attachments) at 14a. The district court's March 11, 1980

order denying reconsideration of its July 2, 1979 order is unreported and appears in the Appendix at 25a. The district court's March 17, 1980 order denying reconsideration of the denial of reconsideration is unreported and appears in the Appendix at 27a.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

28 U.S.C. § 2071 provides:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

Rule 23(d) of the Federal Rules of Civil Procedure provides:

> Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent

> of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

Rule 83 of the Federal Rules of Civil Procedure provides:

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

At all times pertinent to this case, Southern District of Ohio Local Rule 3.9.4 (S.D. Ohio R. 3.9.4) provided in part:

> In every potential or actual class action under Rule 23 of the Federal Rules of Civil Procedure, all parties or potential parties and counsel are forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a

formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of the Court. Any such proposed communication shall be presented to the Court in writing with a designation of or description of all addressees and with an application or motion and proposed order for prior approval by the Court of the proposed communication.[1]

STATEMENT OF THE CASE

This petition seeks review of an opinion and judgment of the United States Court of Appeals for the Sixth Circuit directing issuance of a writ of mandamus to the United States District Court for the Southern District of Ohio, pursuant to 28 U.S.C. § 1651.

A. Background and Proceedings In the District Court

Petitioner The Cincinnati, New Orleans and Texas Pacific Railway Company (the "CNO&TP") operates a line of railroad from Cincinnati, Ohio to Chattanooga, Tennessee. The CNO&TP is one of several common carriers that operate, with petitioner Southern Railway Company, under the trade name "Southern Railway System."

On November 1, 1974, respondent Mzell Williams, a black employee of the CNO&TP, filed a civil action in the United States District Court for the Southern District of Ohio, alleging that his employer had discriminated against him because of his race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"), the Civil Rights Act of 1866, 42 U.S.C.

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[1]The full text of the Local Rule is reproduced in the Appendix at 31a.

§ 1981, and other statutes.[2] Williams also named as defendants the United Transportation Union and its Local 1190.

Williams originally sought only individual relief, but he amended his complaint to allege class claims. On March 25, 1977, the district court entered an order pursuant to Rule 23(b)(2), and (c), Fed. R. Civ. P., certifying Williams as sole representative of two classes of black present and former employees – one asserting claims under Title VII, the other under 42 U.S.C. § 1981. The two classes include more than one hundred persons. On the same date, the district court permitted the Equal Employment Opportunity Commission to intervene in the Title VII action, on Williams' side. In August, 1977, the district court directed issuance of a notice and questionnaire to all members of the certified classes, informing them, *inter alia,* of the pendency of the litigation and of their right to appear individually. (App. at 5a.)

At all times material to this petition, S.D. Ohio R. 3.9.4, which applied to all "potential or actual" class actions, prohibited communications by a party or his counsel to "potential or actual" class members, unless the proposed communications were first presented to the district court for approval.[3] In 1975 and 1977, in accordance with the rule, the district court passed on the permissibility of Williams' proposed communications to class members, allowing some communications and disapproving others. (App. at 4a-6a.)

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[2]As amended, Williams' complaint seeks relief from the CNO&TP, Southern Railway Company, and "Southern Railway System."

[3]The Local Rule was patterned after a rule suggested in the *Manual for Complex Litigation,* 1 Pt. 2 *Moore's Federal Practice,* Part I (Procedures) § 1.41, Part II (Appendix) § 1.41 (2d ed. 1981 and 1980-81 Supp.). Similar local rules were adopted by many other district courts. *E.g.,* M.D. Tenn. R. 14(b)-(c).

Williams has been represented by private counsel since the start of this litigation. Although attorneys employed by the NAACP Legal Defense and Educational Fund, Inc. ("LDF") now participate in Williams' representation, the LDF had no involvement in Williams' civil action until long after class certification had occurred. They first entered appearances as Williams' "co-counsel" in February, 1978.[4]

In January 1979, nearly two years after class certification, Williams moved in the district court for an order permitting him and his counsel to communicate with class members without submitting their proposed communications to the court for approval as required by the Local Rule. Petitioners opposed Williams' motion and cross-moved for an order requiring compliance with the Local Rule, subject to an interpretation that would have permitted witness interviews to occur without prior review. (App. at 6a.)

On July 2, 1979, the district court entered an order that in essence required Williams to comply with the letter of the Local Rule. (App. at 14a.) The court denied Williams' request for an exemption from the Local Rule, noting that Williams remained free to submit his proposed communications for review as contemplated by the Local Rule. The district court also granted petitioners' cross-motion to the extent the court found the motion consistent with the Local Rule, and otherwise denied it. (App. at 23a-24a.)

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[4]The LDF attorneys, representing other plaintiffs, had filed parallel litigation in a different court in December, 1976 (Stallworth v. Southern Railway Co., E.D.Ky., No. 76-180). They have had attorney-client relationships, on an individual basis, with approximately 15 persons who are now members of the classes represented by Williams. Since the Local Rule had no application to attorney-client communications, the LDF lawyers have never been prevented from communicating with those persons.

Williams moved for reconsideration in the district court. That motion was denied (App. at 25a), as was his later motion for reconsideration of the denial of reconsideration (App. at 27a).

B. Proceedings In the Court Of Appeals

Williams appealed the district court's July 2, 1979 order to the United States Court of Appeals for the Sixth Circuit, which found the order nonappealable and dismissed the appeal for lack of jurisdiction. (App. at 7a.)

Williams also petitioned the court of appeals under the All Writs Act, 28 U.S.C. § 1651, for the issuance of a writ of mandamus to set aside both the Local Rule and the district court's order of July 2, 1979, which enforced the Local Rule. Williams contended that both the rule and the order were unconstitutional and in excess of the district court's authority. In an order entered on February 5, 1980, the court of appeals determined that "the proper remedy for obtaining appellate review of the July 2 order was a mandamus action." (App. at 7a.)

Williams' petition for a writ of mandamus named the district court (Timothy S. Hogan, Senior United States District Judge) as respondent, but the Local Rule was defended in the court of appeals by Southern Railway Company and the CNO&TP, petitioners here. The Equal Employment Opportunity Commission, intervenor in the district court, argued in support of mandamus relief.

The court of appeals had not acted on the petition prior to June 1, 1981, when this Court rendered its decision in *Gulf Oil Co.* v. *Bernard,* 101 S.Ct. 2193 (1981) (*"Gulf Oil"*). In *Gulf Oil,* the Court held that a district court had abused its discretion under the Federal Rules of Civil Pro-

cedure when, prior to certification of a proposed Title VII class, it ordered persons seeking to represent the class, and their counsel, not to communicate with potential class members without prior approval of the court, and failed to base its order "on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Id.* at 2200.

The court of appeals entered its opinion on August 26, 1981. The court held that the present case is directly controlled by *Gulf Oil,* and it ordered that a writ of mandamus issue to prohibit the district court from enforcing its Local Rule. (App. at 8a.) The court was of the view that the Local Rule frustrates a policy underlying Rule 23 by interfering with the class representative's ability to prepare his case in private and by precluding communications that might enable absent class members to make informed decisions about their participation in the litigation. (App. at 10a-11a.) The court found that the record "discloses neither legal nor factual grounds on which the district court could have determined that it was necessary or appropriate to impose [its] order." (App. at 12a.)

On this basis, the court declared that the district court's actions amounted to an abuse of discretion; the court of appeals did not reach the question whether the district court's order and Local Rule constituted the most appropriate remedy to counter threatened abuses. *(Id.)* The court of appeals acknowledged no special consideration that might be accorded to a generally-applicable local court rule, as opposed to an order entered in an individual case, and the court apparently did not think it consequential that in the present case class certification had already occurred.

The district court revised its local rules in September, 1981, and although the court of appeals has stayed issuance of its mandate in the present case,[5] the district court has stated in its new rules publication that a rule governing communications with class members is "Reserved."[6] The district court's July 2, 1979 order in the present case remains in effect.

REASONS FOR GRANTING THE WRIT

This case presents the important question whether district courts have the authority to adopt local rules establishing procedures for the review, in *already-certified* class actions, of proposed communications between class representatives and absent members of the classes they represent. The court of appeals' holding that the district courts lack such authority is in conflict with decisions of this Court that have recognized a distinction between the interests of a class representative and those of an absent member of a certified class. Moreover, the decision of the court of appeals unduly limits the power of district courts to impose reasonable restrictions on the conduct of parties and counsel – a power recently acknowledged by the Court in *Gulf Oil Co.* v. *Bernard,* 101 S.Ct. 2193 (1981), which the court of appeals invoked as support for its decision.

Judicial supervision of communications from a class representative to absent members of a certified class serves the purposes of Rule 23. Indeed, such supervision is com-

[5] On September 25, 1981, the court of appeals stayed issuance of its mandate, pursuant to Fed. R. App. P. 41(b), pending the filing of this petition for certiorari. The order staying issuance of the mandate is reproduced in the Appendix at 28a.

[6] The "Reserved" section of the district court's renumbered 1981 rules, which corresponds to former S.D. Ohio R. 3.9.4, is now designated as 3.6.4.

pelled as a result of the unique relationship among the class representative, the absent class members, and the trial court which a certification order establishes. The holding of *Gulf Oil* – that review of proposed communications cannot be required prior to class certification in the absence of specific findings as to threatened abuse – should have no application after the entry of a certification order.

1. Class certification does not imply an identity between the substantive interests of the class representative and those of the absent class members. Rather, "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guaranty National Bank* v. *Roper,* 445 U.S. 326, 332 (1980). That the litigant may have a cognizable interest in obtaining class certification is not equivalent to saying that his individual interests are the same as those of the persons included in the class he seeks to represent. *See id.* at 339-40.

Because the merits of the lawsuit are not considered in determining whether certification should be granted, *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974), the fact of certification conveys no information as to whether the absent class members actually have claims, or, if they do, what those claims might be.[7] Nevertheless, when the named plaintiff's procedural interest is satisfied by the cer-

[7]This is certainly true in the present case. The district court's certification order merely reflects a finding that Williams pleaded, in proper form, (1) the existence of a group of persons who have some common characteristics (e.g., race, employment by the same employer, and membership in the same union), and (2) an allegation of discrimination against persons with those characteristics. The court also found that Williams had established sufficient numerosity to satisfy the requirements of Rule 23, and that Williams would be an adequate representative of two classes with claims such as he alleged.

tification of his lawsuit as a class action, the class acquires a legal status separate from any interest asserted by the named plaintiff. *Sosna* v. *Iowa,* 419 U.S. 393, 399 (1975).[8]

2. In accepting representative status, the named plaintiff in a class action voluntarily assumes a fiduciary obligation toward the absent members of the class. *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 549 (1949); *In re Fine Paper Litigation State of Washington,* 632 F.2d 1081, 1086-87 (3d Cir. 1980). He holds their interests in trust, and because of the "potential for misuse of the class-action mechanism," *Deposit Guaranty National Bank* v. *Roper, supra,* 445 U.S. at 339, it is necessarily the trial court that must supervise the manner in which he carries out his responsibilities. "No type of litigation is more susceptible of regulation than that of a fiduciary nature." *Cohen* v. *Beneficial Industrial Loan Corp., supra,* 337 U.S. at 552.[9]

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[8]Certification is the critical event. Absent certification, the potential class has no status that will permit its claim to survive the mooting of the named plaintiff's individual claim. Board of School Commissioners v. Jacobs, 420 U.S. 128 (1975). Moreover, it is so important to ensure a correct decision on the question of class certification that a denial of certification may be appealed by a named plaintiff whose claim has been mooted or satisfied, Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980); United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980), or by a potential class member, United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977).

Following certification, the claims of the class survive the mootness of the individual claim of the class representative, Franks v. Bowman Transp. Co., 424 U.S. 747, 753-58 (1976), or disqualification of the representative, East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 407 n.12 (1977) (dictum).

[9]In *Cohen,* the Court considered a state law imposing conditions on a stockholder's ability to pursue a derivative action, and said:

> [W]hile the stockholders have chosen the corporate director or manager, they have no such election as to a plaintiff

3. Communications from the named plaintiff to absent class members are especially subject to abuse. Bearing the title of "representative" but having perhaps no more than a self-proclaimed community of interest with the absent class members, the named plaintiff is peculiarly able to mislead those persons whose interests he holds in trust. Accordingly, it falls to the trial court supervising a certified class action to "safeguard" class members "from unauthorized, misleading communications from the parties or their counsel." *Erhardt* v. *Prudential Group, Inc.*, 629 F.2d 843, 846 (2d Cir. 1980) (stating, *inter alia*, that district courts should limit unauthorized correspondence by parties and their counsel with class members). The potential for abuse posed by an unsupervised communication is clear, for "[u]napproved notices to class members which are factually or legally incomplete, lack objectivity and neutrality or contain untruths will surely result in confusion and adversely affect the administration of justice." *Id.* This Court said as much in *Gulf Oil* when it quoted *Waldo* v. *Lakeshore Estates, Inc.*, 433 F.Supp. 782, 790-91 (E.D. La. 1977), *appeal dismissed*, 579 F.2d 642 (5th Cir. 1978), to the effect that "[u]napproved communications to class members that misrepresent the status or effect of the pending action also have an obvious potential for confusion and/or adversely affect-

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who steps forward to represent them. He is a self-chosen representative and a volunteer champion. The Federal Constitution does not oblige the State to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent.

337 U.S. at 549-50.

ing the administration of justice." 101 S.Ct. at 2200 n.12[10]

4. The interests implicated in the decision whether to restrict communications after a class has been certified are quite different from those that were at stake prior to certification. As a result, the stringent tests that must be satisfied before a court may restrict precertification "communications from named plaintiffs and their counsel to *prospective* class members," *Gulf Oil, supra,* 101 S.Ct. at 2195 (emphasis added), should not apply after certification has occurred.

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[10]Immediately following the passage quoted by the Court, 433 F.Supp. at 791, the district court in *Waldo* said:

> Particularly should such communications seem vested with official authority, there arises not only the risk of subsequent disenchantment with the judicial process, but also the danger that individuals will be induced to act to their detriment in reliance upon misinformation and/or falsehoods. Thus entailed in this abuse is something more than a general interest in orderly process which is shared by the court and the public; there is the added interest of the individual in achieving a full and fair judicial remedy. To this extent, it is important to recognize the need for restricting free expression where such presents a "reasonable likelihood" of endangering the individual's constitutional guarantee of a fair trial.
>
> Our conclusion that a sufficiently important objective is served by [the local rule in question] does not rest upon cognizance of the dangers of solicitation alone, or of improper class notice alone, or of misrepresentations alone. It is all such abuses, considered together and viewed in the context of the unique class action procedure, which contribute to the finding that this local rule effectuates a compelling and substantial governmental interest, one rooted in the judiciary, the bar and the public at large. Furthermore, we are satisfied that the potential ills cited in the Manual for Complex Litigation are far from remote or theoretical. The documented experiences of other courts justify a finding that the incidence of abuse in the class action setting is unfortunately high. (Citations and footnote omitted.)

Gulf Oil reaffirms that the pursuit of collective remedies through class litigation is a protected interest. Moreover, *Gulf Oil* makes clear that the absent members of a potential class have an interest in being informed of the existence of a lawsuit that might affect their legal rights, and in having access to information that might bear on decisions they must make that will directly affect those rights. Those interests are satisfied, however, by issuance of a certification order and an order directing such notice to the class as may be appropriate in a particular case.[11]

After certification, the need for *accuracy* in any communications to absent class members is an important interest in need of protection.[12] Rule 23 expressly

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[11]The present case, in which two classes have been certified under Rule 23(b)(2), illustrates how these precertification interests no longer pertain.

Respondent Williams' own interest in pursuing collective remedies has been amply satisfied. Williams has been in court for seven years, and he has been a certified class representative for more than four. He has conceded that he seeks "neither to recruit additional parties nor to solicit funds, but simply to discover the facts, interview prospective witnesses, and prepare the case for trial." (Brief In Support of Petition for a Writ of Mandamus, 6th Cir., March 17, 1980, at 36.) Nor is the right to political expression of Williams' present Legal Defense Fund counsel an issue: Williams was successful in bringing class litigation, obtaining certification with the help of his own private counsel long before the Legal Defense Fund took any interest in this case.

Soon after class certification, the district court ordered that official notice of the litigation be sent to all class members. In some class actions — but not Title VII class actions like *Gulf Oil* and the present case — each class member is faced with a decision whether to "opt out" of a class to be certified under Rule 23(b)(3).

[12]Defendants, as well as the absent members of a plaintiff class, have an interest in ensuring that no class member is misled to his detriment. The defendants' interest lies in being able to prevail at trial and obtain a judgment that is not subject to appellate review or collateral attack brought by a previously absent class member who contends he was misled by a private communication from the class representative.

provides that the control necessary to ensure the transmission of accurate information shall be exercised by the trial court: Rule 23(d) authorizes the giving of notice as appropriate to protect the interests of absent class members, and Rule 23(e) precludes approval of a dismissal or settlement without notice to the class. *Sosna* v. *Iowa, supra,* 419 U.S. at 399 n.8. In *Gulf Oil,* the Court said that a trial court has the "duty and . . . broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." 101 S.Ct. at 2200.

The court of appeals has rejected the need for any such protection. Its decision is premised on another interest that in the court's view pertains during class action litigation — the supposed interest of a class representative in being able to obtain "from absentees, free of defendants' knowledge, information necessary to prove the merits of his claim." (App. at 10a.) This formulation denies that a class representative's performance of his duty is subject to judicial oversight during as well as after litigation, and accordingly it denies the basic premise of the fiduciary relationship. *See Cohen* v. *Beneficial Industrial Loan Corp., supra,* 337 U.S. at 552. Moreover, it is by no means clear that the activity identified by the court of appeals — the communication of information *from* absent class members *to* the class representative (App. at 10a-11a) — is materially impaired by a requirement that communications going in the opposite direction be reviewed by the trial court.[13] Whether this would occur in a particular case

[13]The court of appeals was also wrong in taking the position that a legitimate interest would be infringed if it became known "which claims [the class representative] will more than likely pursue, which are primary and which are secondary." (App. at 10a-11a.) Secrecy as to the nature of claims asserted is particularly inappropriate in litigation where the identities of the claimants are determined by the nature of the claims. *See* Rule 23(a)(3), Fed. R. Civ. P.

is a question that should be addressed by the district court supervising the case, not a question that should be removed from the scope of that court's authority by a sweeping ban on the use of local rules.

5. To be effective, the trial court's review of a communication may have to occur before the communication is sent. The damage caused by a representative's misleading communication to an absent class member may remain undetected for prolonged periods — indeed, it may never be discovered — and may result in the irremediable loss of legal rights. Moreover, good faith on the part of the representative provides no assurance that his communications will not mislead; in complex litigation there is always an opportunity for the inadvertent propagation of advice that is factually or legally erroneous, and therefore dangerous. A requirement for the review of proposed communications is consistent with other limitations that may be called for in litigation; the Court observed in *Gulf Oil* that "[i]n the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses and jurors," and that "the rules of ethics properly impose restraints on some forms of expression." 101 S.Ct. at 2202 n.21.[14]

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[14]This case does not present an occasion for questioning the constitutionality of restrictions on communications imposed by court rule. The court of appeals held S.D. Ohio R. 3.9.4 invalid on nonconstitutional grounds. (App. at 8a.) *See Gulf Oil, supra,* 101 S.Ct. at 2200 n.15. There would certainly be no basis for concluding that a postcertification limitation on communications, otherwise appropriate, is unconstitutional. When a person voluntarily enters a trust relationship, his speech relating to the content of that relationship may constitutionally be subjected to a requirement of prior approval. Snepp v. United States, 444 U.S. 507 (1980) (per curiam). In class action litigation, a trust relationship is created when the trial court accepts the plaintiff's offer to assume the role of certified class representative.

If the review of proposed communications is permissible, then it should be left to the trial court to decide in the first instance what procedures are to be followed. "[A]n order requiring parties to file copies of nonprivileged communications to class members with the court may be appropriate in some circumstances," *Gulf Oil, supra,* 101 S.Ct. at 2202 n.20. In other circumstances, a district court may conclude it would be preferable to adopt a rule of general applicability pursuant to 28 U.S.C. § 2071, establishing a framework within which orders may be issued providing for the review of communications as appropriate in a particular case.

The decision of the court of appeals is unwarrantedly absolute. It forbids the adoption of any local court rule that establishes a mechanism for the review of proposed postcertification communications, even if the rule is used only to assure maintenance of the status quo until an appropriately flexible arrangement is worked out in each case. The court of appeals has read into *Gulf Oil* a general principle that is not there, and has applied that principle in a manner that conflicts with other, settled principles regarding the nature of the class action.

CONCLUSION

Local rules such as the one at issue here were recommended by the *Manual for Complex Litigation* and adopted by many district courts. All courts and class-action litigants have an interest in seeing that *Gulf Oil* is not extended incorrectly to proscribe the use of such rules after the entry of certification orders, when they serve legitimate purposes. On the basis of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1981

APPENDIX

APPENDIX A

No. 79-3643

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MZELL WILLIAMS, *Petitioner,* v. UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, W.D. AT CINCINNATI, *Respondent.*	ON PETITION for Writ of Mandamus to the United States Court for the Southern District of Ohio, Western Division.

Decided and Filed August 26, 1981

Before: WEICK and KEITH, Circuit Judges; PHILLIPS, Senior Circuit Judge.

KEITH, Circuit Judge. Petitioner Mzell Williams requests that this court issue a writ of mandamus directing the district court below to vacate a "gag" order issued pursuant to a local district court rule. The order prohibits, without prior court approval, communications between petitioner or his counsel and the actual or potential class members in this Title VII race discrimination suit. The petitioner contends that the order and local rule exceed the regulatory powers granted to the federal district courts. The defendants argue that this petition for a writ of mandamus should be denied because issuance of the order was well within the authority granted to the district court.

We agree with the petitioner that the order and the local rule exceed the authority of the district court and, accordingly, we issue the requested writ of mandamus.

I

This race discrimination suit is a class action brought pursuant to Title VII of the 1964 Civil Rights Act, as amended 42 U.S.C. § 2000(e) *et seq.* and 42 U.S.C. §1981. Petitioner Williams brought the action in November 1974, charging racial discrimination in hiring, testing, promotion, and seniority by the Defendants Southern Railway System (the "System"), Southern Railway Company (the "Company"), Cincinnati, New Orleans and Texas Pacific Railway Company (the "CNO & TP"), United Transportation Union ("UTU"), and United Transportation Local 1190 ("Local 1190"). Petitioner is a black employee of the defendant, and a member of the UTO and Local 1190. He represents two classes of black present and former employees of the CNO & TP and members of the UTU. The classes were certified on March 25, 1977, under Rule 23(b)(2), Federal Rules of Civil Procedure.

The petitioner alleges in the instant petition that a series of district court orders, culminating in the district court's July 2, 1979 Order, impermissibly restricted communication between the petitioner and the class members. Because the July 2 "gag" Order was issued pursuant to Local Rule 3.9.4, the petitioner also attacks the validity of that rule. Local Rule 3.9.4 provides, in relevant part:

> In every potential or actual class action under Rule 23 of the Federal Rules of Civil Procedure, all parties or potential parties and counsel are forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addresses by order of the Court. Any such proposed communication shall be presented to the Court in

writing with a designation of or description of all addressees and with an application or motion and proposed order for prior approval by the Court of the proposed communication. . . .[1]

This Local Rule was designed to prevent potential abuses of the class action mechanism and is patterned after a rule suggested in the *Manual for Complex Litigation*.[2] The manual

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[1] The Local Rule reads in full:

> In every potential or actual class action under Rule 23 of the Federal Rules of Civil Procedure, all parties or potential parties and counsel are forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed comunication and proposed addressees by order of the Court. Any such proposed communication shall be presented to the Court in writing with a description of all addressees and with an application or motion and proposed order for prior approval by the Court of the proposed communication.
>
> The communications forbidden by this rule include, but are not limited to (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action, (b) solicitation of fees and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action, (c) solicitation by formal parties to the classification of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23 of the Federal Rules of Civil Procedure and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or any administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.
>
> This rule does not forbid (1) communication between an attorney and his client or a prospective client who has, on the initiative of the client or prospective client, consulted with, employed or poposed to employ the attorney or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, misrepresenting the status, purposes or effect of the action and orders therein. U.S. District Court Rules, S.D. Ohio, Rule 3.9.4.

[2] *Manual for Complex Litigation*. 1 Pt. 2 Moore's Federal Practice Part I (Procedures) § 1.41, Pt. II (Appendix) § 1.41 (2d ed. 1979 and 1979-80 Supp.).

notes four prevalent class action communication abuses that the proposed Local Rule is designed to remedy: (1) solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action; (2) solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (3) solicitation by defendants of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23; and (4) unauthorized direct or indirect communications from counsel or a party, which may misrepresent the status, purposes and effect of the action and of court orders therein and which may confuse actual and potential class members and create impressions which may reflect adversely on the court or the administration of justice.[3] Attorney solicitation of clients, funds, and fee agreements are among the most prevalent perceived evils of the class action procedure. Another is the fear that solicitation will encourage frivolous suits.

On three occasions the district court applied Local Rule 3.9.4 restricting communications between the petitioner and class members. In November 1975, petitioner and some members of the class requested that petitioner's counsel meet with 20 to 40 potential class members to discuss the case with them and answer their questions about the litigation. The defendants opposed this meeting and moved under Local Rule

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[3] *Manual*, Pt. I, § 1.41 at 31.

The Manual's recommendations, and the sample local rule and pre-trial order based thereon, have been the subject of much commentary. Some authorities criticize the recommendations and samples for restraining all unapproved communications and only generally excepting constitutionally-protected speech. Contrary authorities, however, have noted that the types of communication which have the potential for abuse are so numerous and unpredictible that the "gag" order and rule are unnecessary.

For discussion on the *Manual's* suggestions, see Wilson, *Control of Class Action Abuses Through Regulation of Communications*, 4 Class Action Reports 632 (1977); Note, *Restrictions on Communications by Class Action Parties and Attorneys*, 1980 Duke L. Rev. 360 (April); Comment, 88 Harvard L. Rev. 1911 (1975).

3.9.4 for an order prohibiting any such communication without the prior approval of the court. The district court granted defendants' motion prohibiting the communication without prior court approval and supervision. The court instructed petitioner's counsel that he or she could attend the meeting, but told them to speak only with those persons who answered "yes" to one of two questions: (1) Have you ever asked for a job in the Southern Railway System or any of its components and did not get it because you were black? (2) If you are black and working for Southern, have you not gone after a better job because you would lose your seniority by taking such a job? Petitioner's counsel complied with this court order.

The Local Rule was applied again in 1977. In August 1977, after certifying the case as a class action, the district court directed that class members be sent a notice and a two-page questionnaire. The notice stated that the questionnaire should be returned to the clerk of the district court within 15 days. The questionnaire asks the following questions:

> Do you consent to Mzell Williams and his attorneys representing your interests in this lawsuit?
>
> Do you wish to intervene and be represented by an attorney of your own choosing?
>
> Have the defendants discriminated against you personally because of your race in the selection of employees for training to become locomotive engineers? If your answer is "yes", please explain how they have done so.
>
> Has the United Transportation Union failed to represent your interests with regard to the subjects of selection of employees for engineering training or the operation of the seniority system? If the answer is "yes", please explain how the United Transportation Union has failed to represent your interests.

Prior to the mailing of the notice and questionnaire to

class members, the petitioner moved the court for an order permitting petitioner's counsel to communicate with class members for the purpose of offering them assistance and legal advice in responding to the questionnaire. This motion was denied. After the notice and questionnaire were mailed to the class members, petitioner's counsel informed the court that he had received requests from class members for assistance and advice, including a request that counsel meet with a group of 20 to 25 class members to provide such assistance and advice. The defendants opposed the requests. The court ruled that petitioner's counsel would not be allowed to attend the proposed meeting because their presence would not be "appropriate". Petitioner's counsel abided by the court's instructions.

The third restriction placed upon petitioner and his counsel is the subject of this petition. In January 1979, the petitioner and his counsel moved for permission to contact and interview class members for purposes of discovery and developing facts in preparation for trial. Defendants opposed this motion and filed a motion to limit such communications. The defendants' motion requested that the district court enjoin petitioner and his counsel from communicating with class members except under the following conditions: (1) all communication between petitioner and the class members must be approved by consent of all parties, or in the absence of consent, by the court after opportunity is presented to all parties to be heard; (2) all proposed written communications must be submitted for approval in accordance with (1) above; (3) the substance of all proposed oral communications must be submitted in written form and shall state the reasons why the proposed communication should not be made in writing; and (4) after the oral communication, petitioner must submit to the court and all other parties, a transcript or detailed account, under oath, of the communication.

In its order of July 2, 1979, the district court denied petitioner's motion requesting *ex parte* contact with other class

members.[4] The court held that Local Rule 3.9.4 was valid and that it applied to the proposed communications. The court enjoined the petitioner from communicating with class members except in compliance with the court's interpretation of the rule. The court, going further than the defendants' request for a copy of the substance of any proposed communication, ruled that the petitioner would be required under Local Rule 3.9.4 to submit to the court a written sample of each proposed communication and a designation or description of all addressees, and that petitioner and his counsel could not communicate with the class members unless and until the court approved the text of each communication.

On July 20, 1979, the petitioner filed a motion in the district court requesting reconsideration of the July 2 order. The petitioner argued that application of the Local Rule violated his rights under the First Amendment. The district court denied the petitioner's motion for reconsideration on March 11, 1980, and by order of March 17, 1980, declined to reconsider that denial. On August 31, 1979, the petitioner filed a notice of appeal to this court from the July 2 order. The CNO & TP moved to dismiss the appeal for lack of subject matter jurisdiction. On February 14, 1980, this court granted the motion to dismiss. The July 2 order was also the basis for the petition for a writ of mandamus filed in this court. On February 5, 1980, we held that the proper remedy for obtaining appellate review of the July 2 order was a mandamus action.[5] This petition for a writ of

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[4] *Mzell Williams* v. *Southern Railway System*, No. C-1-74-442 (S.D. Ohio, July 2, 1979) (Memo: Order Denying Plaintiff's Motion for Approval to Communicate with Class Members and Granting in Part and Denying in Part Defendants' Motion to Limit Communications with Class Members).

[5] *Mzell Williams* v. *United States District Court*, Southern District of Ohio, W.D. at Cincinnati, No. 79-3643 (6th Cir. Feb. 5, 1980). This circuit held that mandamus was the proper remedy since the July 2 discovery order was not appealable and the case presented a "basic undecided question" on an important legal problem. *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964).

mandamus followed the February 5 ruling and is properly before this court.

II

The petitioner requests that this court declare the July 2 order and Local Rule 3.9.4 unconstitutional as an impermissible "prior restraint" on speech. However, we do not find it necessary to reach the constitutional issue. In view of the recent decision of the Supreme Court in *Gulf Oil Company* v. *Bernard*, — U.S. —, 101 S.Ct. 2193 (1981), we hold that Local Rule 3.9.4 on its face and as applied in the July 2 order are invalid because they unduly and unnecessarily frustrate the policies underlying the class action rule and, therefore, exceed the rule-making authority of the district court.[6]

Plaintiffs in *Gulf Oil* filed a class action alleging discrimination in employment. Defendants moved for an order restricting communications from named plaintiffs and their counsel to class members. The district court granted the motion and entered an order which, like Local Rule 3.9.4, was patterned after a model local rule and order contained in § 1.41 of the *Manual for Complex Litigation*. The order required prior court approval on all communications concerning the class action between parties, their counsel and actual or potential class members. The order provided a qualified exception in instances in which any party or counsel asserted a constitutional right to communicate. The court made no findings of fact. A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court. 596 F.2d 1249 (5th Cir. 1979). The court granted the plaintiffs pe-

[6] This circuit has not addressed the question of the validity of Local Rule 3.9.4. However, the United States District Court, Southern District of Ohio, has construed and upheld the validity of the local rule in several cases. *See, e.g., Norris* v. *Colonial Commercial Corp.*, 77 F.R.D. 672 (S.D. Ohio 1977); *Killian* v. *Kroger Company*, No. C-1-76-470 (S.D. Ohio Sept. 23, 1977 and Feb. 13, 1978). To the extent our decision today mandates, these cases are overruled.

tition for a rehearing *en banc* and reversed the panel's decision. 619 F.2d 456 (5th Cir. 1980). The Fifth Circuit held that the order restricting communications was a prior restraint on constitutionally protected expression; that it did not fit within any of the narrowly defined exceptions to the prohibition against prior restraints; that it was not justified by a showing of direct, immediate, and irreparable damage; that it was not shown to be the least restrictive means of preventing such damage; and that it did not comport with constitutionally required procedural safeguards. The *en banc* court concluded that there was a first amendment violation. It also concluded that the order was not an appropriate one under Rule 23 (d), Fed.R.Civ.P. *Id.* at 478. The United States Supreme Court affirmed the 5th Circuit's *en banc* decision. — U.S. —, 101 S.Ct. 2193 (1981). The Court adopted a three-prong test to determine the validity of local gag orders. The *Gulf Oil* test requires that a court look at the order to see if it frustrates a policy underlying Rule 23. Second, if the order does frustrate an underlying policy, then the court must examine the order to determine if it is the least restrictive means available to protect other vital rights which are jeopardized by abuses or potential abuses by a class representative and his counsel. Third, there must be a specific showing by the moving party on the record of abuses or potential abuses. Unless such a showing has been made, the district court has not made a proper finding that the vital rights are in jeopardy and that those rights can only be protected by the "gag" order.

A district court's rule-making authority is derived from Fed.R.Civ.Pro. 83[7] and 28 U.S.C. § 2071.[8] Rule 83 and Section

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[7] Rule 23 provides:

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules . . . In all cases not provided for by rule, the district courts may regulate their practices in any manner not inconsistent with these rules.

[8] 28 U.S.C. § 2071 provides:

The Supreme Court and all courts established by Act of Congress

2071 prohibit a district court from issuing local rules which are inconsistent with the Federal Rules of Civil Procedure, Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. A local rule is inconsistent with federal rules and statutes if it alters those aspects of the litigation process which bear upon the ultimate outcome of the litigation, thereby frustrating federal policies. *Colgrove* v. *Battin*, 413 U.S. 149, 163-64 and n.23 (1973); *Miner* v. *Atlass*, 363 U.S. 641, 649-50 (1960).

As noted in *Gulf*, one major purpose of Rule 23 is to allow adjudication in a single action of claims which meet the Rule's requirements.[9] Local Rule 3.9.4 results in a broad ban on communication with absent class members and creates severe obstacles to class litigation. First, the Local Rule prevents petitioner and his counsel from obtaining from absentees, free of defendants' knowledge, information necessary to prove the merits of his claim. It does not take an exceptional defense attorney to review each sample communication with identified class members and determine which claims

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may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

[9] The class action device, an invention of equity, was adopted in 1938 to facilitate the adjudication of disputes involving common questions and multiple parties in a single action. The 1966 amendments are consistent with the original purpose. *See* Advisory Committee Notes, Fed.R.Civ.P. 23, reprinted in 39 F.R.D. 98 (1966), and 12 C. Wright and A. Miller, *Federal Practice and Procedure*, 411-19 (1973) (app.C). *See also Montgomery Ward & Co.* v. *Langer*, 168 F.2d 182, 187 (8th Cir. 1948) ("The class action was an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs.") *In re General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106, 1127-28 n.33 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979) (class action device is primarily a device to vindicate the rights of individual class members and is also a vehicle for furthering the substantive policies behind legislation); *Welmaker* v. *W. T. Grant Co.*, 365 F.Supp. 531, 553 (N.D. Ga. 1972) "The traditional purpose of a class action is to generate incentive to litigate claims that would otherwise not be litigated because they are so small as to make it impractical to bring individual suits").

petitioner will more than likely pursue, which are primary and which are secondary. The rule and order do not interfere with the privacy or confidentiality of interviews conducted of defendants' management and supervisory employees. However, the petitioner is not permitted the same privacy and confidentiality in interviewing the class members who are petitioner's primary sources of information and testimony. A second problem with the "gag" rule is that it hampers the quest for a fair resolution of absentees' claims by prohibiting communications with class members that enable them to make informed decisions about their participation in the pending litigation. Third, the Local Rule tends to discourage communication, and thus to discourage use of the class action device because of fear of premature disclosure to the opposing party. These are the same adverse effects that were present in *Gulf Oil*.

The Supreme Court in *Gulf* did recognize the potential abuses associated with intra-class communications. Among these are (1) the susceptibility of nonparty class members to solicitation amounting to barratry, (2) the increased opportunities of the parties or counsel to 'drum up' participation in the proceeding, and (3) unapproved communications to class members that misrepresent the status or effect of the pending action. *Gulf Oil, supra*, at 2200 n.12. Yet the court nevertheless held that:

> [A]n order limiting communications between the parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23. *Gulf* at 2200.

The extreme restrictions on intra-class communications im-

posed in the instant case would only be appropriate to control abuses or potential abuses which appeared on the record to be egregious. *Id.* There was no evidence of any abuse or potential abuse introduced below. Thus, this record, like the record in *Gulf Oil*, discloses neither legal nor factual grounds on which the district court could have determined that it was necessary or appropriate to impose the order. Therefore, we do not reach the question of whether the July 2 order was the remedy most appropriate to curtail the threatened abuses. Accordingly, we issue a writ of mandamus to the district court directing it to vacate its July 2 order and to refrain from enforcing the provisions of Local Rule 3.9.4. The case is remanded to the district court for proceedings not inconsistent with this opinion.

APPENDIX B

No. 79-3643

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MZELL WILLIAMS, *Petitioner*	)	
v.	)	ORDER
UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, W.D., AT CINCINNATI, *Respondent*	)	

Upon consideration, it is ORDERED that the slip opinion issued in the above entitled action on August 26, 1981 shall be amended to reflect the following corrections:

1. Page 2, line 12, Section I: "UTO" shall be deleted and "UTU" shall be substituted therefore.

2. Page 2, second to last line: the word "addresses" shall be deleted and the word "addressees" shall be substituted therefor.

3. Page 4, line 9, footnote three: delete "unnecessary" and substitute the word "necessary."

4. Page 8, line 7, Section II: a comma shall placed after "Local Rule 3.9.4."

5. Page 9, line 2: the correct citation for *Bernard v. Gulf Oil Co.* is "619 F.2d 459."

ENTERED BY ORDER OF THE COURT

/s/ _____

John P. Hehman, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MZELL WILLIAMS, Plaintiff	)	
v.	)	No. C-1-74-442
SOUTHERN RAILWAY SYSTEM, et al., Defendants	)	

MEMO; ORDER DENYING PLAINTIFF'S MOTION FOR APPROVAL TO COMMUNICATE WITH CLASS MEMBERS AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO LIMIT COMMUNICATIONS WITH CLASS MEMBERS

This is a civil rights action brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981 by Mzell Williams, a railroad trainman, against the Southern Railway System, the Southern Railway Co., the Cincinnati,, New Orleans, and Texas Pacific Railway Co. (hereinafter referred to as C,NO&TP), the United Transportation Union, and United Transportation Union, Local 1190[1] The Court

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[1]The EEOC is an intervenor plaintiff in this case, alleging a claim against the C,NO&TP (doc. 87).

has certified Mr. Williams' claims against the C,NO&TP as a Rule 23(b)(2) class action (doc. 65, 84). The Court possesses jurisdiction over the subject matter of the case under 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1343(4).

Plaintiff moves for an order granting him and his counsel "permission to communicate with class members concerning the subject matter of this action for purposes of preparing this case for trial" (doc. 98). All defendants except the Southern Railway Co. have opposed plaintiff's motion, citing as authority Local Rule 3.9.4. (doc. 100, 102, 103). Defendants C,NO&TP and Southern Railway System in turn move to limit communications between plaintiff and his counsel, on one hand, and class members, on the other (doc. 100). Plaintiff has opposed defendants' motion (doc. 101). The Court agrees with defendants that Local Rule 3.9.4. controls the disposition of plaintiff's motion and that under Rule 3.9.4. plaintiff's motion must be denied. We accept defendants' proposed limitations only insofar as they are consistent with, and do not expand, the local rule.

A. PLAINTIFF'S MOTION

Because plaintiff has failed to comply with the requirements of Local Rule 3.9.4, his motion for an order granting permission to communicate with class members is denied. Local Rule 3.9.4 provides in pertinent part:

> In every potential or actual class action under Rule 23 of the Federal Rules of Civil Procedure, all parties or potential parties and their counsel are forbidden, directly or indirectly, orally, or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent

> and approval of the proposed communication and proposed addressees by order of the Court. Any such proposed communication shall be presented to the Court in writing with a designation of or description of all addressees and with an application or motion and proposed order for prior approval by the Court of the proposed communication.

The remainder of the rule is set forth in the margin.[2] Rule 3.9.4 is clear in outlining the mechanics and basic re-

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[2]Following the portion of the rule quoted above, Rule 3.9.4. continues:

> The communications forbidden by this rule include, but are not limited to (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action, (b) solicitation of fees and/or agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action, (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23 of the Federal Rules of Civil Procedure and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or any administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule. This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has, on the initiative of the client, consulted with, employed or proposed to employ the attorney or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

quirement of court approval for all communications with class members. Although plaintiff recognizes that Rule 3.9.4 governs the disposition of his motion (doc. 98, supporting memo.), he has not presented the Court with a written description of the proposed communication and a designation of or description of all proposed addressees. Rather, he has elected to challenge the validity of Rule 3.9.4 and its applicability to the present case. Until plaintiff complies with Rule 3.9.4, he shall be enjoined from communicating with class members, and all future communications shall be governed by Rule 3.9.4. Plaintiff's pending motion to communicate with class members is denied.

Plaintiff's challenges to the validity of Rule 3.9.4 and its applicability to this case are disposed of by our Orders in *Killian v. The Kroger Co.*, in which on two occasions we denied plaintiff's motions to communicate with class members because she had failed to include with her motions written descriptions of the content of the proposed communications and descriptions or designations of the proposed addressees. *Killian v. The Kroger Co.*, No. C-1-76-470 (S.D. Ohio Sept. 23, 1977 and Feb. 13, 1978) (doc. 39, 45). *Compare* Memo. of Plaintiff in Reply and Opposition to Motion of Defendants, *Williams* v. *Southern Railway System*, No. C-1-74-442 (S.D. Ohio) (doc. 101), *with* Memo in Support of Plaintiff Killian's Motion to Communicate With Class Members, *Killian v. The Kroger Co.*, No. C-1-76-470 (S.D. Ohio) (doc. 25, 43). In our Orders in *Killian* we distinguished *Rodgers v. United States Steel Corp.*, 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975), and rejected the reasoning and result in *Coles v. Marsh*, 560 F.2d 186 (3d Cir.), *cert. denied sub nom. Blue Cross of Western Pennsylvania v. Marsh*, 434 U.S. 985 (1977), in which the United States Court of Appeals for the Third Circuit had disapproved of

a local rule and an order substantially similar to Local Rule 3.9.4. In accord with our Orders in *Killian* are *Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782 (E.D. La. 1977), *appeal dismissed*, 579 F.2d 642 (5th Cir. Aug. 15, 1978), and *Brown v. The Gillette Co.*, 21 Fed.R.Serv. 2d 372 (D. Mass. 1975).

Local Rule 3.9.4 is patterned on Suggested Local Rule No. 7 contained in the *Manual for Complex Litigation*. *Compare* S.D. Ohio L.R. 3.9.4 *with Manual for Complex Litigation* Appendix § 1.41, at 187-88 (West 1977). Suggested Rule No. 7 is not without its critics. *Rodgers v. United States Steel Corp.*, 508 F.2d at 164-65 and n. 18; 2 H. Newberg, *Class* Actions § 2720f. at 1200-03 (1977); *see* "Developments in the Law - Class Actions," 89 *Harv.L.Rev.* 1318, 1597-1604 (1976); 88 *Harv.L.Rev.* 1911, 1917-23 (1975). *Compare Manual for Complex Litigation* Appendix § 1.41, at 187-88 (West 1977), *with id.* at 188-89 and *Coles v. Marsh, supra.* However, Suggested Rule No. 7 is, we think, the product of sound deliberation. *Rodgers v. United States Steel Corp.*, 508 F.2d at 165-66 (Weis, J., concurring); *Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. at 789-94; *see Manual for Complex Litigation* § 1.41, at 27-31 (West 1977). The Board of Editors of the Manual is well aware of the criticism that the rule has received but has decided against modifying it, except when a controlling decision of the court of appeals of the circuit requires it. *Manual for Complex Litigation* 1-3 (West 1978 Cum. Supp.). In only one case has the United States Court of Appeals for the Sixth Circuit addressed a Local Rule 3.9.4 issue, and in that case the Sixth Circuit did not address the validity of Rule 3.9.4 but simply agreed with the district court that the rule had not been violated by the defendant's communications with class members. *Conduit Pipe Products Co. v. The Baltimore &*

Ohio Railroad Co., No. 77-3151 (6th Cir. Nov. 3, 1978 (unpublished order).[3] Apart from this Judge's Orders in *Killian v. The Kroger Co., supra,* at least one other Judge of this Court has applied Rule 3.9.4's proscriptions to require court approval of proposed communications with class members. *Norris v. Colonial Commercial Corp.*, 77 F.R.D. 672 (S.D. Ohio 1977) (Rubin, J.); *accord, Vance v. Fashion Two Twenty, Inc.*, 16 Fed. R. Serv. 2d 1513 (N.D. Ohio 1973). We therefore see no reason for diverting from the requirements of Local Rule 3.9.4 at this time.

B. DEFENDANTS' MOTION

In their motion, defendants Southern Railway System and C,NO&TP request an order limiting communications between plaintiff Williams and his counsel, on the one hand, and class members, on the other, in this manner:

> 1. No communication, oral or written, direct or indirect, concerning the substance of this action, shall be made to class members by plaintiff or his counsel, without the consent of all other parties, or, in the absence of such consent, wihout prior submission to, and approval by the Court. Such a submission shall be in the form of a motion upon which all parties are permitted an opportunity to be heard.
>
> 2. In the case of a proposed written communication, plaintiff shall submit a copy of such proposed communication for approval in accor-

[3] As an unpublished decision, the Court's order in *Conduit Pipe* has no precedential value. Sixth Circuit R. 11.

dance with the provisions of the second sentence of S.D. Ohio R. 3.9.4.

3. In the case of a proposed oral communication, plaintiff shall submit for prior approval a written statement of the substance of the proposed communication, in accordance with the provisions of the second sentence of S.D. Ohio R. 3.9.4, and shall in addition state the reasons why the proposed communication should not be made in writing. Following an oral communication, plaintiff shall submit to the Court and all other parties (a) a transcript or detailed account, under oath, of such communication, and (b) a list of the recipients of such communication.

4. Communications between an attorney and his client or a prospective client are not precluded, but a member of either or both of the certified classes in this action shall not be considered a client or prospective client of plaintiff's attorney for purposes of S.D. Ohio R. 3.9.4 solely by virtue of the inclusion of such person in such class or classes.

5. Plaintiff and his attorney are not precluded from interviewing and obtaining statements from individual class members, with respect to their knowledge regarding the subject matter of this action, without prior approval. Plaintiff and his attorney shall refrain, during any such interview with an individual class member, from communicating any opinion of the merits or possible outcome of this action.

(doc. 100). We will address each proposed limitation separately.

Paragraph 2 is essentially a restatement of Local Rule 3.9.4's directive concerning written communications with class members, and the parties (specifically plaintiff and his counsel) are reminded of the rule's additional requirement that with a sample of the proposed communication should also be submitted to the Court a designation of or description of all addressees.

Paragraph 3 attempts to meet Rule 3.9.4's requirements, as applied to oral communications. Defendants suggest that plaintiff submit for the Court's approval a written statement of the substance of the proposed communication. We addressed this issue in *Killian v. The Kroger Co. Compare Killian v. The Kroger Co.*, No. C-1-76-470 (S.D. Ohio Feb. 13, 1978) (doc. 45) *with* plaintiff Killian's Motion to Communicate With Class Members and Proposed Order, *Killian v. The Kroger Co.*, No. C-1-76-470 (S.D. Ohio) (doc. 43). We interpret Rule 3.9.4 as requiring a written sample of the proposed oral communication – not merely a statement of the substance of the communication. We recognize that the actual communication may deviate from the sample, but we do not think that Rule 3.9.4 envisions that this deviation should be more than insubstantial. We will rely on the professionalism and good faith of plaintiff's counsel to assure that the actual communication is substantially identical to the written sample. We do not believe that a post-communication transcript or account of the actual communication is necessary. Rule 3.9.4 requires a designation of or description of the addressees of the proposed oral communication. It does not require a list of actual recipients of such communication. *Killian v. The Kroger Co.*, No. C-1-76-470, slip op. at 2 (S.D. Ohio Feb. 13, 1978) (doc. 45).

Paragraph 1 would remove from the Court's scrutiny those proposed communications, both oral and written,

upon which the parties can agree. Although we respect defendants' effort to conserve judicial energy, Rule 3.9.4 provides no exception for the Court's approval of proposed communications; *all* communications are subject to court approval. If the parties can agree to a proposed communication, they may submit a written stipulation with the proposed communication to the Court. As Rule 3.9.4 expressly directs, each proposed communication shall be submitted to the Court by application or motion. All formal parties to this action will have the opportunity to be heard on the motion or application in accordance with the time schedule established by Local Rule 3.5.2.

Paragraph 4 addresses an exception contained in Local Rule 3.9.4. This exception provides:

> This rule does not forbid . . . communications between an attorney and his client or a prospective client, who has, on the initiative of the client or prospective client, consulted with, employed or proposed to employ the attorney . . . .

Clearly, the rule does not affect communications between a formal party to the lawsuit and his attorney, such as plaintiff Williams and his counsel. But class members are not clients for purposes of the rule, for this would render meaningless the proscriptions outlined in the rule.

Paragraph 5 would apparently permit the open-ended type of communications between the class representative and his counsel, on the one hand, and class members, on the other, which we refused to permit in *Killian v. The Kroger Co. Compare Killian v. The Kroger Co.*, No. C-1-76-470 (S.D. Ohio Sept. 23, 1977 and Feb. 13, 1978) (doc. 39, 45), *with* Plaintiff Killian's Motions to Communicate With Class Members, *Killian v. The Kroger Co.*, C-1-76-470 (S.D. Ohio) doc. 25, 43). *But see* 2 H.

Newberg, *supra* § 2730a, at 1215, § 2820. Unlike some local rules, *compare* D. Md. L.R. 20 *with American Finance System, Inc. v. Pickrel,* 18 Fed. R. Serv. 2d 314 (D. Md. 1974), Local Rule 3.9.4 is drafted broadly, prohibiting all forms of unapproved communication, including, we believe, discovery-related communications. With due respect to plaintiff and his counsel, we think that any reliance on their good faith in this context would defeat the obvious purpose of the rule to anticipatorily prevent the opportunity for abuse of the class action procedure. *See Waldo v. Lakeshore Estates, Inc.,* 433 F.Supp. at 790-92 and n. 10; *Manual for Complex Litigation* § 1.41, at 27-31 (West 1977).

In short, defendants' proposed limitations on communications between plaintiff and his counsel, on the one hand, and class members, on the other, are accepted only insofar as they are consistent with Local Rule 3.9.4, by virtue of either its express terms or the construction we have given it.

ORDER

Plaintiff Mzell Williams moves for the issuance of an order granting him and his counsel permission to communicate with class members. Because plaintiff has not complied with Local Rule 3.9.4 by failing to submit with his motion a written sample of the proposed communication and a designation or description of all addressees, plaintiff's motion is denied without prejudice. Plaintiff may renew his motion. The Court will consider any motion to communicate with class members in light of Local Rule 3.9.4 and the interpretation of it which we have rendered in the opinion accompanying this Order.

Defendants Southern Railway System and the Cincinnati, New Orleans, & Texas Pacific Railway Co. move to limit communications by plaintiff and his counsel with class members. We have addressed each of defendants' proposed limitations in the opinion accompanying this Order. Insofar as the proposed limitations are consistent with Local Rule 3.9.4, defendants' motion is granted. Insofar as the proposed limitations either expand or narrow the local rule, defendants' motion is denied.

SO ORDERED.

/s/

United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MZELL WILLIAMS,	)	
Plaintiff	)	
	)	
v.	)	No.
	)	C-1-74-442
SOUTHERN RAILWAY SYSTEM, et al.,	)	
Defendants	)	

ORDER

There is pending before the Court Plaintiff's Motion for Reconsideration of the Order of July 2, 1979 (doc. 106), by which the Court denied plaintiff's motion to communicate with class members. The Court of Appeals has characterized the motion to reconsider as filed untimely pursuant to Federal Rule of Civil Procedure 59(e).[1] *Williams v. Southern Railway System,* No. 79-3734 (6th Cir. Jan. 16, 1980) (order dismissing appeal; copy attached) (citing *Peabody Coal Co. v. Local Union Nos. 1734, 1508 & 1548, UMW,* 484 F.2d 78 (6th Cir. 1973)); *cf. Smith v. Hudson,* 600 F.2d 60, 62-63 (6th Cir. June 21, 1979) (Court of Appeals, considering timeliness of filing of notice of appeal, characterizes motion to reconsider

[1]Rule 59(e) provides, "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Plaintiff's motion to reconsider was served on July 20, 1979 (doc. 106). As noted, the order at which it is directed had been entered on July 2, 1979 (doc. 104).

and vacate an order granting a summary judgment as a Rule 59(e) motion), *appeal dismissed,* 48 U.S.L.W. 3388 (U.S. Dec. 5, 1979). Plaintiff's motion is denied as untimely.[2] *See Gray v. Dukedom Bank,* 216 F.2d 108 (6th Cir. 1954); *Gilroy v. Erie-Lackawanna Railroad Co.,* 44 F.R.D. 3 (S.D. N.Y. 1968).

In light of this disposition, the Court's Order Granting [Plaintiff's] Motion For Retention of Record in the District Court (doc. 115) is vacated.

SO ORDERED.

/ s /

United States Senior District Judge

[2]The 10-day time period of Rule 59(e) may not be enlarged pursuant to Rule 6(b). *Perry v. Richardson,* 440 F.2d 677, 679 (6th Cir. 1971). *Compare* Fed.R.Civ.P. 6(b) *with* Fed. R. Civ.P. 59(e).

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MZELL WILLIAMS, Plaintiff	)	
v.	)	No. C-1-74-442
SOUTHERN RAILWAY SYSTEM, et al. Defendants	)	

ORDER

The Motion for Reconsideration of the denial of the
" " "

(let's stop it here)
raises an interesting law school question.

As a practical matter and for reasons covered at least a year ago informally –

1) The motion to reconsider is denied, and

2) The motion to reconsider the denial of reconsideration is denied – too.

Please do not request further re- re- reconsideration.

This case was placed on the March 25th call calendar by mistake. It will have to remain in limbo pending determination of Circuit No. 79-3643.

/s/ _____
United States Senior District Judge

APPENDIX F

Filed
Sep 25 1981
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

No. 79-3643

MZELL WILLIAMS,
Petitioner,

vs.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, W.D. AT CINCINNATI,
Respondent.

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been

filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

/s/ _____

John P. Hehman, Clerk

APPENDIX G

FILED
AUG 26 1981
John P. Hehman, Clerk

No. 79-3643

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MZELL WILLIAMS, *Petitioner,*	)
vs.	) ORDER
UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION, AT CINCINNATI, *Respondent.*	)

Before: WEICK and KEITH, Circuit Judges; PHILLIPS, Senior Circuit Judge.

Upon consideration of the petition for writ of mandamus which was argued by counsel and in conformity with the Court's opinion which was entered this date,

It is ORDERED that the writ of mandamus issue and that the respondent vacate its order of July 2, 1979, and to refrain from enforcing the provisions of Local Rule 3.9.4. The case is remanded to the district court for further proceedings.

ENTERED BY ORDER OF THE COURT

/s/ _____
Clerk

APPENDIX H

SOUTHERN DISTRICT OF OHIO
RULE 3.9.4

3.9.4 Prevention of Potential Abuses of Class Actions

In every potential or actual class action under Rule 23 of the Federal Rules of Civil Procedure, all parties or potential parties and counsel are forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of the Court. Any such proposed communication shall be presented to the Court in writing with a designation of or description of all addressees and with an application or motion and proposed order for prior approval by the Court of the proposed communication.

The communications forbidden by this rule include, but are not limited to (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action, (b) solicitation of fees and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action, (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23 of the Federal Rules of Civil Procedure and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect

adversely on any party, any counsel, the Court, or any administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.

This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has, on the initiative of the client or prospective client, consulted with, employed or proposed to employ the attorney or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

Opposition

Office - Supreme Court, U.S.
FILED
NOV 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-778

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SOUTHERN RAILWAY COMPANY and THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY,

Petitioners,

v.

MZELL WILLIAMS, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied this Court's decision last Term in Gulf Oil Co. v. Bernard in ruling that a district court had exceeded its authority by enforcing a local rule, now repealed, which imposed sweeping restraints on communications by the plaintiff and his counsel with members of the certified classes in this civil rights action, where the record contained no evidence and the district court made no findings concerning either the need for such restraints or their interference with the prosecution of the action.

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The Sixth Circuit Correctly Applied this Court's Decision in Gulf Oil v. Bernard to the Facts of this Case	14
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Manual for Complex Litigation, 1 Pt. 2 Moore's Federal Practice (2d ed. 1980) 3,10,16

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No. 81-778

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

SOUTHERN RAILWAY COMPANY and THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY,

Petitioners,

v.

MZELL WILLIAMS, et al.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Until its repeal in September of 1981 (see Pet. at 9), Local Rule 3.9.4 of the United States District Court for the

Southern District of Ohio, entitled "Prevention of Potential Abuses of Class Actions," provided in pertinent part as follows:[1/]

> In every potential or actual class action under Rule 23 of the Federal Rules of Civil Procedure, all parties or potential parties and counsel are forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of the Court ....

The language of the local rule was essentially identical to the language of the order restraining communications with potential class members in Gulf Oil Co. v. Bernard, 101 S. Ct. 2193 (1981). The local

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1/ The full text of the local rule is reproduced in the appendix to the petition. (App. 31a-32a). In this brief, "App." refers to the appendix to the petition filed in this Court, and "J.A." refers to the joint appendix filed in the court of appeals.

rule in the present case, like the order in Gulf Oil, was adopted in accordance with the recommendations of § 1.41 and Suggested Local Rule No. 7 of the Manual for Complex Litigation, 1 Pt. 2 Moore's Federal Practice at 31-37, 225-26 (2d ed. 1980).[2/]

In this employment discrimination action, the local rule was applied by the district court in a manner which thwarted

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2/ The Manual for Complex Litigation is being revised. In a tentative draft issued prior to this Court's decision in Gulf Oil, the Manual's board of editors continued to recommend that district courts routinely enter broad pretrial orders limiting communications in actual and potential class actions, without any evidence or any findings of need. However, the board deleted all recommendations that communications with actual or potential class members be restricted by local rule, and the board removed Suggested Local Rule No. 7 from the Manual's appendix. Manual for Complex Litigation, Tentative Draft of the Fifth Revision, with Amendments to Feb. 4, 1980, at 67-76, 504-10 (issued by the Federal Judicial Center, June 24, 1980). The final draft of the revised Manual has not been issued.

efforts by the plaintiff and his counsel to communicate with class members both before and after class certification.

1. In November 1975, approximately one year after this action was filed and before any class was certified, the plaintiff and members of his proposed class requested that plaintiff's counsel meet with a group of potential class members to discuss the case and to answer questions about the litigation. The defendants opposed this meeting and moved under the local rule for an order prohibiting any such communication without the prior approval of the court. The district court granted the defendants' motion, permitting plaintiff's counsel to attend the meeting but instructing them to speak only with those persons who answered "yes" to one of two questions: (1) Have

you ever asked for a job in the Southern Railway System or any of its components and been denied the job because you were black? (2) If you are black and working for Southern, have you not sought a better job because you would lose your seniority by taking such a job? Plaintiff's counsel complied with the district court's order. (App. 4a-5a).

2. The local rule was applied again in 1977 in a manner which prevented class members from receiving the advice and assistance of plaintiff's counsel. After certifying the case as a class action,[3/] the district court directed that class members be sent a notice and a two-page

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3/ In March 1977, the court certified two classes of black present and former employees pursuant to Rule 23(b)(2), Fed. R. Civ. P. (App. 2a).

questionnaire, to be returned to the clerk of the court within 15 days.[4/] Prior to mailing the notice and questionnaire to class members, plaintiff's counsel moved the court for an order permitting them to offer advice and legal assistance to the class members in responding to the questionnaire.

4/ The questionnaire asked, inter alia, the following questions (see App. 5a):

> Do you consent to Mzell Williams and his attorneys representing your interests in this lawsuit?
>
> Do you wish to intervene and be represented by an attorney of your own choosing?
>
> Have the defendants discriminated against you personally because of your race in the selection of employees for training to become locomotive engineers? If your answer is "yes," please explain how they have done so.
>
> Have the defendants discriminated against you personally because of your race in the operation of the seniority system? If your answer is "yes," please explain how they have done so.

This motion was denied. After the notice and questionnaire had been mailed, plaintiff's counsel received a number of requests from class members for such assistance and advice, including a request that counsel meet with a group of 20 to 25 class members for this purpose. The defendants opposed these requests, and the court ruled that it would not be "appropriate" for plaintiff's counsel to attend the proposed meeting. Plaintiff's counsel abided by the court's instructions. (App. 5a-6a).

4/ continued

> Has the United Transportation Union failed to represent your interests with regard to the subjects of selection of employees for engineer training or the operation of the seniority system? If the answer is "yes," please explain how the United Transportation Union has failed to represent your interests.

3. In their most recent effort to communicate with class members, plaintiff's counsel moved in January 1979 for permission to contact and interview class members for purposes of discovery and trial preparation. The defendants opposed this motion and filed a motion to limit such communications.[5/] In July 1979, the district court denied the plaintiff's motion. The court held that the local rule was valid and that it applied to the proposed communications, and the court enjoined the plaintiff and his counsel from communicating with class members except in

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5/ The defendants' motion requested that the district court enjoin the plaintiff and his counsel from communicating with class members except under specified conditions. (See App. 6a). The court rejected these conditions as too permissive, "accept[ing] defendants' proposed limitations only insofar as they are consistent with, and do not expand, the local rule." (App. 15a).

compliance with the court's interpretation of the rule. Plaintiff and his counsel were required to submit to the court a written sample of each proposed communication and a designation or description of all addressees, and they were forbidden to communicate with the class members unless and until the court approved the text of each communication. (App. 6a-7a).

The district court's memorandum opinion (App. 14a-23a) made it clear that, like the earlier restraints on communications, the 1979 gag order was not justified by any facts or circumstances peculiar to this case. There was no evidence that the plaintiff or his counsel had engaged or were ever likely to engage in any improper or unethical conduct,[6/] nor was there any

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6/ Since February 1978, the plaintiff and the certified classes have been represented

evidence that the proposed communications posed any threat to the fair administration of justice. Rather, the district court here, like the district court in Gulf Oil v. Bernard, found the justification for these restrictions in the general recommendations of § 1.41 of the Manual for Complex Litigation. (See App. 18a). As the district court stated:

> It was the concern of the judges of this district court in promulgating Rule 3.9.4, that the class action lends itself more easily than the non-

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6/ continued

not only by a major Cincinnati law firm but also by attorneys from the NAACP Legal Defense and Educational Fund, Inc. This Court observed in Gulf Oil v. Bernard that "traditional concerns about 'stirring up' litigation ... [are] particularly misplaced" where, as here, the plaintiffs are "represented by lawyers from the NAACP Legal Defense and Education[al] Fund -- a nonprofit organization dedicated to the vindication of the legal rights of blacks and other citizens." 101 S. Ct. at 2199 n.11.

> class action suit to barratry and other abuses of ethical norms, in general. ...
>
> ... This Court must reject the Third Circuit's rationale [in Coles v. Marsh, 560 F.2d 186 (3d Cir.), cert. denied, 434 U.S. 985 (1977)] in requiring a party moving for a protective order under Rule 3.9.4 to show specific need. The Rule was adopted in this district court to thwart potential problems and abuses. ... 7/

Killian v. Kroger Co., No. C-1-76-470, slip op. at 4-5 (S.D. Ohio, Feb. 13, 1978) (emphasis in original; footnote added). 8/

7/ In Gulf Oil v. Bernard, this Court expressly approved both the reasoning and the result of the Third Circuit's decision in Coles v. Marsh. See 101 S. Ct. at 2201.

8/ The quoted language is from one of two orders in Killian v. Kroger Co. which the district court appended to its opinion of July 2, 1979, in the present case. Like the case at bar, Killian was an employment discrimination class action in which the district court applied its local rule to restrict communications by the plaintiff and her counsel with class members for the purpose of discovery and trial preparation. Although the district court stated in its opinion in the present case that its ap-

The district court subsequently declined to reconsider its 1979 order, and the plaintiff filed both a notice of appeal and a petition for a writ of mandamus. (App. 7a-8a). The Sixth Circuit dismissed the appeal but issued a writ of mandamus directing the district court to vacate the order and to refrain from enforcing the local rule. (App. 12a, 30a). The Sixth Circuit held that, under this Court's decision in Gulf Oil v. Bernard, both the local rule and the gag order were "invalid because they unduly and unnecessarily frus-

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8/ continued

pended orders in Killian "disposed of" plaintiff Williams' challenge to the validity and applicability of the local rule (App. 17a), the petitioners failed to include the Killian orders in the appendix to their petition for a writ of certiorari. Those orders are reproduced in the joint appendix filed in the court of appeals. (J.A. 83-92).

trate the policies underlying the class action rule and, therefore, exceed the rule-making authority of the district court." (App. 8a) (footnote omitted). The court of appeals has stayed its mandate pending disposition of the petition for a writ of certiorari. (App. 28a-29a).

SUMMARY OF THE ARGUMENT

In its unanimous decision last Term in Gulf Oil v. Bernard, this Court invalidated unjustified restraints on communications by plaintiffs and their counsel with potential class members. In the present case, the district court's local rule and orders imposed unjustified blanket restrictions on such communications both before and after class certification. The court of appeals correctly applied Gulf Oil in holding the local rule and orders invalid. Therefore,

the petition for a writ of certiorari should be denied or, in the alternative, the Court should grant the petition and summarily affirm the Sixth Circuit's order.

ARGUMENT

THE SIXTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISION IN GULF OIL v. BERNARD TO THE FACTS OF THIS CASE

Both before and after this employment discrimination case was certified as a class action, the district court applied its Local Rule 3.9.4 to limit communications by the plaintiff and his counsel with class members. These restrictions imposed a crippling burden on the ability of plaintiff's counsel to discover the facts and prepare for trial, and they prevented class members from receiving the advice and assistance of the attorneys representing

their interests in this litigation.[9/] As the court of appeals stated, the local rule "results in a broad ban on communication with absent class members and creates severe obstacles to class litigation." (App. 10a).

Last Term, this Court held that such sweeping restraints on communications with potential class members, when imposed in the absence of a clear record and specific

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9/ The record contains an affidavit of plaintiff's counsel establishing the need for communication with class members and describing how the local rule and the gag orders interfered with the effective litigation of the class action. This affidavit is reproduced in the joint appendix filed in the court of appeals. (J.A. 118-22). The defendants did not submit affidavits or offer any other evidence indicating any need whatsoever for a limitation on communications with class members.

findings of need, and when based upon nothing more than the general recommendations of the Manual for Complex Litigation, constitute an abuse of discretion and exceed the district court's authority under the Federal Rules of Civil Procedure. Gulf Oil Co. v. Bernard, 101 S. Ct. 2193 (1981).[10/] Petitioners have suggested only one material difference between Gulf Oil and

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10/ The Fifth Circuit held in Gulf Oil that such restraints violate both Rule 23, Fed. R. Civ. P., and the First Amendment. Bernard v. Gulf Oil Co., 619 F.2d 459 (5th Cir. 1980) (en banc). While this Court did not reach the constitutional question, it recognized

> that the order involved serious restraints on expression. This fact, at a minimum, counsels caution on the part of a District Court in drafting such an order, and attention to whether the restraint is justified by a likelihood of serious abuses.

101 S. Ct. at 2202.

Respondent submits that the local rule and the orders in the present case violated both Rule 23 and the First Amendment.

the present case: The order limiting communications in Gulf Oil was entered before any class was certified, whereas here the district court restrained communications with class members both before and after class certification. However, petitioners offered no evidence, and the district court made no finding, of any actual or threatened abuse or misconduct by the respondent or his counsel which might justify such restraints at any stage of the litigation. The district court here, like the district court in Gulf Oil, did not "weigh ... the need for a limitation and the potential interference with the rights of the parties," 101 S. Ct. at 2200, but simply "adopted in toto the [local rule] suggested by the Manual for Complex Litigation -- on the apparent assumption that no particularized weighing

of the circumstances of the case was necessary." Id. at 2201.[11/] As this Court concluded in Gulf Oil:

> [T]he mere possibility of abuses does not justify routine adoption of a communications ban that interferes with the formation of a class or the prosecution of a class action in accordance with the Rules [of Civil Procedure]. There certainly is no justification for adopting verbatim the form of order recommended by the Manual for Complex Litigation in the absence of a clear record and specific findings of need.

101 S. Ct. at 2202 (emphasis added).

Nothing in the Court's opinion in Gulf Oil suggests that an unjustified ban on communications may be imposed after a class

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11/ The ban on communications in Gulf Oil took the form of a pretrial order rather than a local rule. As the Fifth Circuit noted in its en banc opinion in that case, the same basic analysis applies to both the orders and the rules recommended by § 1.41 of the Manual for Complex Litigation. See 619 F.2d at 466 & nn.5-6, 467 & n.9, 471 n.22.

has been certified.[12/] Indeed, the need for communication by plaintiffs and their attorneys with class members is often greater, and the burden of justifying restraints is therefore heavier, after class certification than before.[13/] At any stage of class litigation, under Gulf

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12/ The Fifth Circuit observed in its en banc opinion in Gulf Oil that "the presence or absence of certification does not materially affect the considerations that we view as controlling." 619 F.2d at 475 n.29.

13/ In the present case, for example, the district court exercised its authority under Rule 23(d), Fed. R. Civ. P., to require that class members be notified of the pendency of the action. The notice informed class members that "Mzell Williams and the attorneys representing him will represent your interests in the lawsuit unless you dispute Mr. Williams' representation of your interests." (J.A. 59-60). The questionnaire which accompanied this notice included an item by which class members could indicate whether they wished to be represented by the plaintiff and his attorneys, or whether they wished instead to intervene and be represented by separate counsel. (App. 5a). Not a single class member chose to be represented by separate

Oil even the narrowest limitation on communications by a plaintiff or his counsel with class members must be supported by a clear record and specific findings of need.[14/] There was no such record and

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13/ continued

counsel. Thus, particularly in the circumstances of this case, certification of a class "not only confers upon absent persons the status of litigants, but in addition it creates an attorney-client relationship between those persons and a lawyer or group of lawyers." Amos v. Board of School Directors, 408 F. Supp. 765, 774 (E.D. Wis.), aff'd, 539 F.2d 625 (7th Cir. 1976), vacated on other grounds, 433 U.S. 672 (1977). See also Greenfield v. Villager Industries, Inc., 483 F.2d 824, 832 (3d Cir. 1973). The imposition of unjustified post-certification restraints on communications impermissibly interfered with this attorney-client relationship in the present case.

14/ There is no conflict among the circuits on this issue. The only pertinent circuit court decision cited by petitioners -- Erhardt v. Prudential Group, Inc., 629 F.2d 843 (2d Cir. 1980) -- correctly anticipated this Court's decision in Gulf Oil. Contrary to petitioners' suggestion (see Pet. at 12), in Erhardt neither the plaintiff nor his counsel was guilty of

there were no such findings here. The court of appeals therefore correctly held that Local Rule 3.9.4 and its application in this case exceeded the authority of the district court.

For the foregoing reasons, the petition for a writ of certiorari should be denied. In the alternative, the petition

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14/ continued

making any erroneous or misleading statements to class members. Rather, the president of the corporate defendant had sent misleading letters urging class members to opt out of the plaintiff's class. Based upon this clear record of abuse, and in view of the specific need to remedy confusion resulting from the misleading letters, the district court required the defendants to send corrective notices to the class members and enjoined the defendants from further communications with class members except upon prior aproval of the court. 629 F.2d at 845. The Second Circuit approved of these remedial measures but vacated the district court's finding of civil contempt on the ground that the misconduct of the defendant's president had not violated a specific order of the court. Id. at 846-47.

should be granted and the Sixth Circuit's order should be summarily affirmed pursuant to Rule 23.1 of the Rules of this Court. Summary affirmance would provide courts and counsel with appropriate guidance in applying this Court's decision in Gulf Oil v. Bernard. See Chardon v. Fernandez, 50 U.S.L.W. 3341 (Nov. 2, 1981); Sword Line, Inc. v. United States, 351 U.S. 976 (1956).

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be granted and the Sixth

Circuit's order should be summarily affirmed in light of this Court's decision in Gulf Oil v. Bernard.

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Petitioner's Reply Brief

No. 81-778

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SOUTHERN RAILWAY COMPANY and
THE CINCINNATI, NEW ORLEANS AND
TEXAS PACIFIC RAILWAY COMPANY,
Petitioners,

v.

MZELL WILLIAMS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY OF PETITIONERS

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REPLY OF PETITIONERS

This is the reply of petitioners Southern Railway Company and The Cincinnati, New Orleans and Texas Pacific Railway Company to the brief in opposition filed by respondent Mzell Williams.[1] Williams has chosen not to address the issue presented in the Petition, and he does not directly dispute our analysis of the nature of the fiduciary duty assumed by the representative of a certified class. Instead, he argues that this case is wholly controlled by the Court's decision last Term in *Gulf Oil Co.* v. *Bernard,* 101 S.Ct. 2193 (1981). We submit that this is not so, and that

[1]Petitioners' parent companies, subsidiaries, and affiliates are listed in the Petition at page ii.

the question we present for review implicates principles not acknowledged either by Williams or by the court of appeals below.

The question presented in this case is not, as Williams would have it, whether the district court's order of July 2, 1979, is invalid for lack of specific findings justifying the requirement for review of Williams' proposed postcertification communications to absent class members. That order did no more than require Williams to comply with the district court's generally-applicable local rule that provided a procedural framework for such review. The question before the Court is whether district courts have authority to adopt such local rules.

Williams contends that *Gulf Oil* invalidates every restriction on communications — even a procedural restriction taking the form of a requirement for the review of a proposed communication *after* certification has occurred — unless the restriction is supported by findings, specific to the case, that reflect a weighing of the need for the restriction against the potential interference with the rights of the parties. If Williams is correct, then the supervision of postcertification communications through the use of generally-applicable local court rules is always outside the authority of the district courts.

If Williams is correct, then the trial court has no meaningful role as protector of the interests of the absent members of a certified class. Williams assumes implicitly that parties *other* than the class representative will devote themselves to the protection of the interests of absent class members and will take whatever action may be necessary to bring before the trial court the issue of the class representative's performance of his fiduciary duties. Williams treats the protection of absent class members as

merely another of the items that might be addressed by the parties – or ignored by them – during the course of an adversary proceeding. This is inconsistent with the doctrine that a fiduciary's performance of his duty is subject to effective judicial supervision.

Moreover, if Williams is correct, then it is impossible in practical terms for *anyone* to exercise effective supervision over the manner in which the class representative performs his fiduciary duties. Both Williams and the court of appeals maintain that an important interest is served in keeping the class representative's postcertification communications secret from other parties. They would deprive the other parties of the very information that would be necessary to permit the issue to be brought before the trial court.

Williams erroneously assumes that no weighing of interests occurs when a district court adopts a local rule to establish the procedural framework within which it will exercise the necessary supervision over the conduct of certified class actions. Like the court of appeals, he fails to acknowledge that the need to protect the interests of the absent members of certified classes is itself a compelling interest, and that the power to review the proposed communications of class representatives is an important component of that protection.

We submit that Williams cannot be correct. *Gulf Oil* does not compel affirmance here, and it is the court of appeals that erred in failing to accord recognition to settled class-action principles. These principles do not dictate that trial courts should always subject all proposed postcertification communications to a perpetual blanket limitation, but they do require that trial courts retain the authority to

evaluate in an orderly manner the particular interests that might militate against or in favor of communications in the circumstances of particular certified class actions.

For the reasons stated here and in the Petition, the writ of certiorari should issue.

Respectfully submitted,

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